United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

438

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,182

UNITED STATES OF AMERICA,

Appellee

v.

ROBERT F. MINOR,

Appellant

Appeal From The United States District Court
For The District of Columbia

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This case is an appeal from a judgment entered against the Appellant (Defendant below) by the United States District Court for the District of Columbia on April 15, 1969. Appellant's application for leave to appeal without prepayment of fees and costs, pursuant to 28 U.S.C. §1915, was granted on June 20, 1969. This Court has jurisdiction of this appeal pursuant to 28 U.S.C. §1291.

STATEMENT OF CASE

Appellant Robert F. Minor, in an indictment filed on March 20, 1967, was indicted on one count of second-degree murder (22 D.C. CODE §2403). The Grand Jury charged that on or about December 18, 1966, Minor with malice aforethought, inflicted various injuries on Lewis James Cooper, from which Cooper died on or about January 4, 1967. Minor was

tried before United States District Court Judge William B. Bryant on October 9 through 11, 1967; and the jury returned a verdict of guilty as to second-degree murder.

On May 10, 1968, Minor's counsel filed a motion for new trial after learning that the Government neglected to produce a material document in response to a timely demand by Appellant's counsel at trial pursuant to the Jencks Act (18 U.S.C. §3500). The document set forth in substance what the Government's principal (and only eye) witness, Charles F. McNeil, stated during a pretrial interview. On June 17, 1968, Judge Bryant agreed that the document constituted Jencks Act material, found that the document should have been produced by the Government at trial, and granted Appellant's new trial.

Appellant Minor was then tried before Judge John H. Pratt; and on April 15, 1969, the jury returned a verdict of guilty as to the second-degree murder.

The relevant facts and circumstances of the case are as follows: On December 19, 1966, Captain Robert B. Wissman of the Metropolitan Police Department, responding to a call received at 12:45 a.m. (Tr. 28), found Lewis J. Cooper lying on the sidewalk in an unconscious condition in front of a rooming house at 1113 O Street, N.W. (Tr. 33-4). Captain Wissman then entered the first floor of the premises at the address, saw Mr. Minor walking down the staircase from the second floor with a two-by-four piece of wood in his hands, and placed him under arrest (Tr. 35-37; 86-88). Mr. Minor did not make any overt move to threaten Captain Wissman with the wood or otherwise to resist arrest (Tr. 229-231).

As of December 19, 1966 (the night of the Appellant's arrest), Mr. Cooper had been living at 1113 O Street for about a month and a half (Tr. 7; 65-7; 244). On a cold winter night near the residence of his

mother, Appellant found Mr. Cooper asking for help and a place to stay for the night (Tr. 7; 65-6). Minor agreed to aid Cooper, and carried him to his mother's one-room apartment in which Appellant, Mary Benefield (Appellant's mother), and Charles F. McNeil were also residing (Tr. 4; 18-9; 65-6). Cooper was given a place in the room to sleep, food and comforters to keep him warm (Tr. 7-8; 66). Prior to the night of Appellant's arrest, Appellant and Cooper had an amicable relationship, and did not have any apparent disagreements (Tr. 24-5, 66, 71).

Appellant was employed by the Hayloft Restaurant, 1409 H Street, N.W. to help at the bar and clean the premises (Tr. 50; 67; 99-100). His employer was satisfied with his work, and on the night of his arrest had decided to offer him a better job (Tr. 100). On Sunday, December 18, 1966, at about 5:00 or 6:00 p.m., Appellant left his mother's room, and walked to the Hayloft (Tr. 21; 72). Sunday was his day off. He stayed at the Hayloft for a short time, and then went to visit his cousin on Florida Avenue (Tr. 72). He returned to the Hayloft at about 7:00 p.m. (Tr. 51; 72).

While at the Hayloft, Appellant drank about ten or twelve beers, and approximately seven or eight glasses of wine (Tr. 91). He stayed at the Hayloft until somewhere between 12:15 and 12:30 a.m., at which time he left with his friend and fellow-employee Jimmy D. White (Tr. 52-3; 73-4). Minor left White, walked to 1113 O Street, and arrived there between 12:50 and 12:55 a.m. (Tr. 75). When he arrived, his mother, Charles McNeil, Hesikiah Blue (Appellant's uncle), David Blue (Appellant's uncle) and the Blues' two ladyfriends were in his mother's room. All had been drinking hard liquor (Tr. 22-3; 78).

When Minor returned to 1113 O Street, he saw Mr. Cooper lying partly in the hall and partly in his mother's room (Tr. 75). After seeing his mother and the others in the room, he went upstairs to his uncle's

second-floor room (where he sometimes slept and lived - Tr. 93), started to remove some of his clothing, and, within about fifteen minutes and after thinking about possible danger to himself, returned downstairs with a two-by-four piece of wood (Tr. 89-90). At that point, Captain Wissman appeared on the scene, and arrested Appellant. Captain Wissman did not notice any lye or lye burns on Appellant's hands or body, on the clothing which he wore when he was arrested, or on his clothing which Captain Wissman retrieved from the second-floor room (Tr. 36-7; 77).

Mr. Cooper was taken to Freedmen's Hospital on December 19, 1966 (Tr. 30), and died on January 4, 1967. He had lacerations on his face and head (Tr. 30-1; 40), and burns on his face and other parts of his body (Tr. 30-1; 41). Based on an autopsy performed on January 5, 1967, Dr. Marion Mann, the then Deputy Coroner for the District of Columbia, expressed his opinion that Mr. Cooper's death was caused by cerebral contusions, or bruises of brain tissue, and that such contusions resulted from contact with "some blunt object" (Tr. 42).

The prosecution (and the grand jury indictment) claimed that Appellant returned from the Hayloft on December 19, and, without provocation, struck Cooper with a chair, kicked him with his shod feet, and threw lye on him, thereby causing injuries from which Cooper died on January 4, 1967. Out of six individuals who were with Mr. Cooper at the time of the alleged beating, the prosecution presented only one as a witness, Charles McNeil, who testified that Appellant Minor, rather than being at the Hayloft or en route from the nightclub, was in his mother's room and administered the beating to Cooper (Tr. 10-14). According to McNeil's version of the events occurring on December 19, none of the six individuals (three men and three women) in the room made any effort to prevent or dissuade Mr. Minor from beating Mr. Cooper (Tr. 14).

Mr. McNeil indicated that Minor engaged in the following activities when he returned to the rooming house on December 19: (i) asked his mother for food; (ii) went to the kitchen three rooms down the hall and ate food in the refrigerator; (iii) returned to his mother's room and argued with his mother about her caring for Mr. Cooper; (iv) left the room for "quite a little bit"; (v) returned to the room, threatened to kill Mr. Cooper, and hit him with a chair; (vi) kicked Mr. Cooper with his shod feet; (vii) walked to the kitchen (three rooms down the hall) to get lye; (viii) returned to his mother's room and poured lye over Cooper; (ix) threw Cooper down the steps leading to the sidewalk outside; (x) went upstairs to the second floor; and (xi) returned downstairs when Captain Wissman appeared on the scene (Tr. 8-13). As noted previously, Appellant started to walk to his mother's room from the Hayloft sometime between 12:15 a.m. and 12:30 a.m. Captain Wissman received a call at 12:45 a.m. that Cooper was lying on the sidewalk. Significantly, if McNeil's testimony was accurate, Minor's walk home from the Hayloft (some 9 blocks), plus all the activities described by McNeil, would have occurred within an almost inconceivably short period of less than 30 minutes (perhaps, less than 15 minutes).

Appellant took the stand and testified that he did not strike, or throw lye on, Cooper, and that he found Cooper lying on the hallway floor when he returned from the Hayloft (Tr. 75). To corroborate Appellant's testimony, Appellant's counsel read to the jury previous testimony of two witnesses who testified at the first trial and were not available at the time of the second trial (Tr. 49-54;96-101). Appellant also testified that he held the two-by-four piece of wood when Captain Wissman arrived to protect himself against the individuals in his mother's room (Tr. 86-7). There was no evidence that Appellant used the two-by-four in a menacing manner toward any one in the rooming house (including Captain Wissman) (Tr. 35-6, 87-90, 228-31).

Prior to Appellant's taking the stand at both the first and second trial, Appellant requested the trial court to exercise its discretion and exclude the use of Appellant's former criminal record for impeachment purposes, pursuant to Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965). Judge Bryant agreed that prejudice engendered by the use of any portion of Appellant's criminal record outweighed any possible probative value of evidence of prior convictions. However, the trial court at the second trial denied Appellant's request and ruled that Appellant's 1964 burglary conviction could be used for impeachment purposes (Tr. 55-63).

In addition, after presenting his case at the second trial, Appellant's counsel asked the trial judge to give the jury a manslaughter instruction (as well as the second-degree murder instruction) (Tr. 102). The judge refused to give the manslaughter instruction on the ground that, if the jury believed that, contrary to his testimony, Appellant administered the beating to Cooper, the evidence presented at trial did not indicate provocation sufficient to justify the return of a manslaughter, instead of a second-degree murder, verdict (Tr. 102-110).

Furthermore, during the course of his closing argument, the prosecutor, Mr. Kelley, made the following statement regarding Minor's demeanor at the time of his arrest by Captain Wissman (and, in particular, his carrying of the two-by-four piece of wood):

> "Well, what is the purpose of this testimony, ladies and gentlemen, what is the purpose of it? In the Government's view, it has two purposes: It can show, one, a consciousness of guilt on the part of this defendant. You are entitled to infer, ladies and gentlemen, from this conduct as testified to by Captain Wissman, and indeed, it was substantially admitted by the defendant that he was contemplating resisting arrest by the officer. You

> are entitled, are you not, to reject out of hand his testimony that he did not know who that man was when he advanced within five or six feet of him, a man in full uniform in a lighted place. You are entitled to infer he was contemplating, at least, resisting arrest. He did not actually resist arrest, because he did eventually drop it. Can you not infer a resistance of arrest, and can you not infer from that consciousness of guilt? But more than that, ladies and gentlemen, isn't that testimony relevant for another purpose? Because you have to look at this situation as a whole, if you believe the testimony of Charles McNeil as substantially corroborated by that of Mrs. McCoates, didn't this man go beserk that night? Didn't he completely lose his head and is that not -- is not this activity with the 2 by 4, coming down the stairs with the 2 by 4, isn't that simply a continuation of that activity, the young man was in a frenzy?" (Tr., Closing Statements, 6-7).

Appellant's counsel objected to this summation, and asked that these remarks be stricken (Tr., Closing Statements, 7). The trial court warned the prosecutor "to keep this case in context," but decided not to strike the remarks (Tr., Closing Statements, 7). The trial judge at the second trial did not give the jury any instructions regarding the implications of flight by the defendant (or resistance to arrest).

ARGUMENT

1. Appellant Minor's conviction must be reversed because the trial judge abused his discretion in allowing the admission of evidence of a prior criminal conviction of Appellant to impeach Appellant's testimony at the trial.

At Appellant's second trial, the District Court, adopting a position contrary to that taken by Judge Bryant in Appellant's first trial, held that Appellant's 1964 conviction for housebreaking in Maryland could be used by the prosecution to impeach his testimony. Appellant's

counsel took timely exception to this ruling. Since (i) a housebreaking conviction sheds little light on Appellant's veracity, (ii) Appellant's defense rested almost entirely on his own testimony at trial, (iii) the trial in the main involved a "credibility match" between the defendant testifying on his own behalf and the prosecutor's only eyewitness, and (iv) Appellant was being charged with second-degree murder, the probative value of the prior conviction on credibility was far outweighed by the potential prejudice to the defendant. Therefore, under the guidelines set forth in Luck v. United States, supra page 6, and subsequent decisions implementing Luck, the trial court abused its discretion in allowing the admission of prior conviction evidence, and Appellant's conviction must be reversed.

That a housebreaking conviction has little, if any, bearing on a defendant's veracity is clear from this Court's decision in United States v. McCord, ___ U.S. App. D.C. ___, ___ F.2d ___ (1969) (No. 22,308). There, this Court stated:

> "The prior record which the trial judge held admissible was a 1954 housebreaking and larceny conviction. A man who steals is not necessarily a man who lies. A conviction for housebreaking, unlike one for perjury or false pretenses, sheds little light on the likelihood that the accused has lied on the stand. The prejudicial propensity of past convictions demands that as the probative value of a convictions lessens, greater caution be exercised in admitting it into evidence and that the trial judge explain to the jury the lesser weight to be given the conviction in evaluating the witness' testimony."

Hence, the trial court's finding at the second trial that the housebreaking conviction bears adversely on Appellant's veracity was clearly erroneous.

Furthermore, this Court has emphasized at various times that a "credibility contest" between the prosecutor's witnesses and the defendant's witnesses heightens the importance of the Luck hearing.

McCord v. United States, supra; Jones v. United States, 131 U.S. App. D.C. 88, 402 F.2d 639 (1968); Brown v. United States, 125 U.S. App. D.C. 220, 370 F.2d 242 (1966). A brief review of Appellant's two trials will demonstrate the extent of the "credibility match" involved in the case at hand. At the first trial, the government primarily relied upon Charles F. McNeil, an "eyewitness" to the alleged crime, and Mary L. McCoates, who then lived in an apartment adjacent to the one in which Mr. Cooper was beaten, and allegedly overheard conversations and noises connected with the beating. Counsel for the defense did not try to impeach the credibility of these government witnesses. The defense relied entirely upon the testimony of the defendant establishing an alibi defense and the corroborative testimony of the defendant's employer, Luther Cutcher, and a co-worker, Jimmy D. White.

The government, at the second trial, presented the same witnesses, McNeil and McCoates. Once again, counsel for the defense did not attempt to impeach the government witnesses. Since the corroborative witnesses, Cutcher and White, were not available for the second trial, the defense could only place the Appellant on the stand, and read the prior testimony of Cutcher and White into the record.

Thus at both trials, the outcome of the case turned on whether the jury believed the government's two witnesses or the defendant. At such trials, where the credibility of the government's witnesses is not impeached, the prejudice which would result from an attempt to impeach defendant's credibility is so great, and the defendant's testimony is so critical to the search for the truth, that, absent crimes like perjury or false pretenses which are directly related to veracity, the credibility match should clearly be decided by the jury without evidence of prior convictions of the defendant.

In arguing the Luck issue at the second trial, the prosecutor stated that impeachment should be permitted because defense counsel, in his opening statement, indicated an intent to place the defendant on the stand. The prosecutor reasoned that since the judge's Luck ruling would not keep the defendant from testifying, use of his prior convictions should be allowed. Such an argument is specious, since the Luck considerations with respect to prejudicial effect apply regardless of whether the accused has testified or decided to testify. Williams v. United States, 129 U.S. App. D.C. 332, 338; 394 F.2d 957, 962 (1968) (concurring opinion). This is particularly so where the defendant, because of a strongly favorable Luck ruling at the first trial, expected the same ruling at the second trial (which involved factors even more conducive to a favorable Luck ruling than the first trial).

2. This Court, in the exercise of its supervisory powers, should bar the use of all prior convictions to impeach a defendant's credibility (except in very limited circumstances), and should reverse Appellant's conviction as a first step in implementing the new rule.

Appellant strongly urges that this Court exercise its supervisory powers over the administration of criminal justice in the District of Columbia so as to exclude the use of prior convictions of a defendant who wishes to testify on his own behalf, unless the defendant affirmatively seeks to support his credibility by the introduction of independent evidence. This would be in accordance with Rule 106 of the Model Code of Evidence and Rule 21 of the Uniform Rules of Evidence. As recently as March 20, 1970, this Court noted the problems of prejudice inherent in the situation where the jury has been alerted to the defendant's criminal record, and indicated that the court's supervisory power is available to remedy the problem. See United States v. Bailey, __ U.S. App. D.C. __, __ F.2d __ (1970) (No. 22,432).

In 1966, KALVEN & SEISEL, in THE AMERICAN JURY, showed statistically the effects of notifying the jury of the defendant's criminal record. In cases where the defendant had no criminal record or the jury was unaware of such record, the percentage of acquittals for defendants was 65%, while in cases where the jury knew or suspected that the defendant had a criminal record, the percentage of acquittals was only 38% (Id. at 160). The cases included in both classes had substantially the same strength based on the evidence presented. One commentator noted the significance of the Kalven & Zeisel study as follows:

> "The results of this study suggests that the introduction into evidence of record convictions for the purpose of impeaching the defendant's credibility is so prejudicial that he may not receive a fair trial. Thus, the prosecutor may obtain a conviction without having introduced evidence admissible on the issue of guilt in sufficient quantity to establish that guilt beyond a reasonable doubt." Note, Constitutional Problems Inherent in the Admissibility of Prior Record Conviction Evidence for the Purpose of Impeaching the Defendant Witness, 37 CINN. L. REV. 168, 170 (1968).*

Moreover, Judge Fahy in Bailey noted the futility in expecting that the jury will, as a practical matter, be able to abide by the instruction to consider the prior convictions only as they relate to credibility. See Nash v. United States, 54 F.2d 1006 (2d Cir. 1932), cert. denied, 285 U.S. 556 (1932); Krulewitch v. United States, 336 U.S. 440, 443 (1949) (Jackson, J. concurring). On this point, Justice Walter V. Schaefer of the Illinois Supreme Court has stated:

> "We accept much self-deception on this. We say that the evidence of the prior convictions is admissible only to impeach the defendant's testimony, and not as evidence of the prior crimes themselves. Juries are solemnly instructed to

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* For the results of earlier studies in 1960, see Note, Other Crimes Evidence at Trial: Of Balancing and Other Matters, 70 YALE L. JOURN. 763, 777 (1961)

> this effect. Is there anyone who doubts what the effect of this evidence in fact is on the jury? If we know so clearly what we are actually doing, why do we pretend that we are not doing what we clearly are doing?" SCHAEFER, THE SUSPECT AND SOCIETY 68 (1967).

Appellant also believes that this Court should take judicial notice of the spate of newspaper and magazine articles concerning the current extremely serious crime problem in the District of Columbia, especially with respect to individuals with prior criminal records. This situation will tend to cause juries in the District to be abnormally sensitive about crime and recidivism and to be more likely to view a defendant's criminal record as evidence of his propensity toward crime rather than restricting its use to the credibility issue.

This Court might feel somewhat reluctant to exercise its supervisory powers in this area because of 14 D.C. CODE §305, which provides in part that --

> "a person is not competent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime. The fact of conviction may be given in evidence to affect his credibility as a witness, either upon the cross-examination of the witness or by evidence aliunde."

This statutory provision, however, is some 70 years old, and was enacted for the primary purpose of removing the common law disqualification of persons with criminal records from testifying in either civil or criminal cases (Blakney v. United States, 130 U.S. App. D.C. 87, 88-9, 397 F.2d 648, 649-50 (1968)). Noting that §305 is not written in mandatory terms, this Court restricted its scope in Luck by finding that the statute leaves room for a trial judge to exclude prior conviction evidence where (i) "the cause of truth would be helped more by letting the jury hear the defendant's story than by the defendant's foregoing that opportunity because of the fear of prejudice founded upon a prior conviction"; or (ii) "the prejudicial effect of impeachment far outweighs the pro-

bative relevance of the prior conviction to the issue of credibility." The adoption of a rule similar to Rule 106 of the Model Code of Evidence would merely reflect this Court's recognition of the fact that, because of the effect of prior conviction evidence on juries, truth must invaribly suffer and undue prejudice must necessarily result in any jurisdiction where prior convictions are admitted to impeach a defendant's credibility (except perhaps in the case where the defendant affirmatively makes crediblity an issue). If the discretion explicit in §305 was sufficient to permit the Luck restriction on the use of prior conviction evidence, it should logically allow the recommended extension of Luck. §305 would still remain applicable to civil witnesses, criminal witnesses who are not defendants, and defendant-witnesses who wish to present affirmative evidence of their credibility.

For these reasons, we believe this Court should take a significant step to further the fair administration of criminal justice in this jurisdiction by adopting a rule similar to Rule 106 of the Model Code of Evidence or a Rule 21 of the Uniform Rules of Evidence. In implementing this new rule, the Court should reverse Appellant's conviction resulting from a trial at which a prior burglary conviction was used to impeach his credibility.

3. Appellant Minor's conviction must be reversed because the admission of evidence of a prior criminal conviction at Appellant's second trial when the trial judge at the first trial refused to permit the introduction of such evidence unconstitutionally penalized Appellant in exercising his right to a new trial.

Prior to Appellant's taking the stand at both the first and second trial, Appellant requested the trial court to exclude the use of Appellant's prior criminal record for impeachment purposes pursuant to the test set forth in Luck v. United States, supra, page 6. Judge Bryant,

at the first trial, agreed that prejudice engendered by the use of any portion of Appellant's criminal record outweighed any possible probative value in determining credibility. However, as noted above, the court at the second trial denied Appellant's request and ruled that Appellant's conviction of burglary in 1964 could be used for impeachment purposes. The action of the trial court violates the constitutional requirement of due process, as interpreted by the United States Supreme Court in North Carolina v. Pearce, 395 U.S. 711 (1969).

In Pearce (and the companion case of Simpson v. Rice), the Supreme Court dealt with defendants who had appealed prior criminal convictions, had obtained reversals based on procedural grounds, had been subsequently reconvicted at new trials, and had been given sentences greater than those originally imposed at the first trial. One of the defendants had not been given credit for time served under the original sentence.

The Court first ruled on the constitutionality of not providing credit for time served under the original sentence, and unanimously found that the failure to give such credit violated the double jeopardy clause incorporated into the Fourteenth Amendment. The Court then faced the question of whether it is constitutional to impose a sentence at the new trial which is harsher than the original sentence (even if credit is given for time served under the original sentence). Although the Court did not impose a blanket constitutional prohibition against imposition of a greater sentence at the retrial, it required, as a matter of due process, the following factual justification for the heavier sentencing after conviction:

> "[W]herever a judge imposes a more severe sentence upon a defendant after a new trial,

> the reasons for his doing so must affirmatively appear. These reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding . . . ."*

The Court reasoned that, absent such factual justification, the imposition of greater sentences on these defendants who won appeals would violate due process because (i) fear of vindictiveness might deter exercise of a defendant's right to appeal, and (ii) statutory or constitutional rights to appeal must be free and unfettered, and must not be burdened by unreasoned distinctions.

Concurring Justices Douglas and Marshall relied on the double jeopardy clause in holding that the penalty imposed at the new trial cannot exceed the penalty imposed at the first trial. In so finding, the Justices emphasized that the double jeopardy clause prevents "[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict . . . ."

Implicit in the majority's view of the due process clause and the concurring Justices' view of the double jeopardy prohibition is that, although as a theoretical matter the granting of a new trial wipes the slate clean, the defendant is entitled to consistency in the application of substantive and procedural criminal law to the facts of his case. A different application of the law at the second trial to the detriment of the defendant would tend to create doubt, ambiguity and uncertainty concerning the integrity of the judicial process.

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* Significantly, the Court rejected the suggestion of Justice White that any objective, identifiable factual data not known to the trial judge at the time of the original sentencing proceeding could justify an increased sentence.

The due process reasoning applied by the United States Supreme Court in Pearce and the Court's concern about misuse of prosecutorial power by the government and the integrity of the judicial process, is equally applicable to the case at hand. There exists the same risk of vindictiveness by the trial judge (or prosecutor) at the second trial. Furthermore, if evidence of his prior convictions were admissible at the second trial, his right to appeal from the government's failure to comply with the Jencks Act would be burdened with a condition similar to the possibility of an increased sentence.

Thirdly, the ability of a court at a new trial to apply the Luck doctrine more harshly to a defendant than the original trial judge provides the government with an incentive to bring about successive prosecutions by committing reversible error after a Luck ruling favorable to the defendant with the hope of having a better opportunity to convict at the second trial.

Fourthly, the integrity of the judicial process must necessarily be jeopardized in the mind of the defendant and his fellow citizens when the law regarding the use of prior convictions at his trial is applied inconsistently to the same set of facts in the same case. This is especially so in Appellant's case where the facts at the second trial were more conducive to a Luck ruling favorable to the Appellant than the facts at the first trial.

Therefore, apart from whether the court at the second trial, in applying the Luck doctrine, properly balanced the substantial prejudice to the defendant against the minimal probative value of the evidence of a prior burglary conviction, and even if this Court does not exercise its supervisory power over the administration of criminal justice in the

District to restrict the use of prior convictions to cases where the defendant introduces affirmative evidence as to his credibility, this Court must still reverse Appellant's conviction because the trial judge's adverse Luck ruling at the second trial, when compared to the favorable Luck ruling at the first trial, violated the due process clause of the Fifth Amendment to the U.S. Constitution.

4. Minor's conviction must be reversed because the trial court refused to give the jury a manslaughter instruction.

At the trial, Appellant's counsel requested the judge to give the jury a manslaughter instruction. Judge Pratt refused on the ground that there was no evidence in the record to support a finding of manslaughter. He concluded that any provocation stemming from Appellant's mother and others in the room at the time of the alleged crime, as a matter of law, was not sufficient to negate the existence of malice aforethought.

An accused is entitled to an instruction on manslaughter if there is "any evidence fairly tending to bear upon the issue of manslaughter, however weak, and that the court may not intrude on the province of the jury which may find credibility in testimony that the judge may consider completely overborne by the simply overwhelming evidence of the prosecutor." Belton v. United States, 127 U.S. App. D.C. 201, 382 F.2d 150 (D.C. Cir. 1967). Furthermore, if a trial court is specifically apprised of the construction of events upon which defendant's counsel bases the need for a manslaughter instruction, the court should give such instruction even though it is not clear whether there is testimony "fairly tending" to bear on manslaughter (Ibid.). This is so because --

> ". . . in the balancing of the elements of justice the principle that the jury should be permitted to find the facts is a cornerstone of our jurisprudence that is dominant, where choice must be made, and outweighs the proper concern that the jury should not be allowed to speculate or determine punishment instead of guilt . . . . [T]he administration of justice may be served better by attention to realities than to vigorous logic. In short, we suggest that where the issue is close, the request of defense counsel may properly be given the benefit of the doubt. The danger of giving the jury a power to make punishment lenient (by downgrading the offense) is offset in part by the discretion available to the trial court on sentencing. And it is appropriate to take into account the strain on judicial administration resulting from the need for retrial if the position of the trial court is not sustained on appeal . . . ."
> 382 F.2d 156

Judge Leventhal in Belton also indicated that there may be some evidence of a lesser offense justifying an instruction relating to such offense even though the evidence depends on inference from a state of facts that is ascertained from prosecution, as well as defense, witnesses. Accord, Broughman v. United States, 124 U.S. App. D.C. 54, 361 F.2d 71 (1966); Young v. United States, 114 U.S. App. D.C. 42, 309 F.2d 662 (1962).

Although the Appellant testified that he was not at the scene of the crime when Cooper was beaten, and such testimony did not relate to manslaughter, the other evidence nevertheless may be rationally constructed to bear on manslaughter in the following ways:

(i) Mary L. McCoates, a government witness testified that loud noises were emanating from the room of Appellant's mother at the time Cooper was allegedly being beaten (Tr. 238). The noises sounded as if table and chairs were being overturned (Tr. 238). On the basis of such commotion, it would not be irrational for a jury to infer that some

or all the individuals in the room (including Cooper) were involved in a brawl, and that any injuries inflicted on Cooper by Minor were provoked by Cooper by himself or in conjunction with others.

(ii) Although as a general rule words in themselves may not be sufficient to constitute provocation sufficient to reduce a voluntary homicide to manslaughter, insulting words plus an otherwise slight physical assault, or informational words disclosing prior inflammatory conduct, may justify a manslaughter verdict. It would not be irrational for the jury to infer that Cooper by himself or in conjunction with others in the room provoked Minor with insulting words plus some form of physical contact, or by disclosing prior inflammatory conduct by Cooper (again, by himself or in conjunction with others).

(iii) The testimony of Appellant's witness, White and Cutcher, indicates that Appellant did not have a state of mind bent on mischief or a generally depraved, wicked or malicious spirit a few minutes before the alleged beating occurred. Captain Wissman's testimony provides little, if any, support for the existence of such a state of mind or spirit a few minutes after the alleged beating occurred. Furthermore, the government did not present any evidence indicating that Minor had any ill will or hostility toward Cooper prior to the night of the crime; in fact, as McNeil testified, Minor was responsible for bringing Cooper to his mother's room for food and shelter. Here again, a reasonable jury could rationally infer from these facts that any sudden shift in his feelings toward Cooper was the result of provocation sufficient to reduce the charge to manslaughter.

Thus, it is quite clear that the above evidence bearing on manslaughter in the case at hand passes the Belton test for determining

when a manslaughter instruction is required. The very recent case of United States v. Comer, ___ U.S. App. D.C. ___, ___ F.2d ___ (1970) (No. 22,383), is even stronger support for the position that the trial court committed reversible error in not giving the jury a manslaughter instruction. There, Judge Wright pointed out that, even if the facts presented at trial are not in dispute and no evidence has been introduced which explicitly tends to negate a finding of malice (or, conversely, tends to support a finding of provocation), "the inquiry is not at an end." According to Judge Wright --

> "Rather the court must appraise all the testimony and evidence to determine whether it is capable of more than one reasonable inference. Thus in a manslaughter case such as the present one, the inquiry is whether the evidence bearing on malice was so compelling and unequivocal on the issue that a jury finding of no malice would be irrational."

As in Belton, the Comer court emphasized that "the jury's role as fact-finder is so central to our jurisprudence that, in close cases, the trial court should generally opt in favor of giving an instruction on a lesser included offense."

5. Appellant's conviction must be reversed because the prosecutor, in his closing statement, made remarks tending to inflame the jury, not supported by the evidence at trial, and at odds with the Grand Jury indictment and the government's stated position at the trial.

During the course of his summation before the jury, the prosecuting attorney made the following statement:

> ". . . [F]urthermore, of course, ladies and gentlemen, there is the testimony of Captain Wissman. He arrived on the scene shortly after 12:45. He comes into the first floor hallway, went by the building having seen the

deceased, by the way, on his way in. He goes in and seeing -- goes into the first floor hallway, and he heard something from a person, and he looked, and he sees the defendant at the top of the flight of stairs. He estimated the distance as 20 to 25 feet away, did he not? The man that -- the defendant came down the stairs not with the board resting on his shoulder as Mr. Miner would have you believe, but raised about the shoulder. You can conclude, can you not, it was in a threatening position, comes down the stairs, continues to advance until he was within a few feet of the officer. The officer having told him more than once to drop it. Finally Mr. Miner did drop it when he was very close to the officer. There was nothing to obstruct Mr. Miner's view of the officer, the officer was in full uniform, the corridor well lit.

"Well, what is the purpose of this testimony, ladies and gentlemen, what is the purpose of it? In the Government's view, it has two purposes: It can show, one, a consciousness of guilt on the part of this defendant. You are entitled to infer, ladies and gentlemen, from this conduct as testified to by Captain Wissman, and indeed, it was substantially admitted by the defendant that he was contemplating resisting arrest by the officer. You are entitled, are you not, to reject out of hand his testimony that he did not know who that man was when he advanced within five or six feet of him, a man in full uniform in a lighted place. You are entitled to infer he was contemplating, at least, resisting arrest. He did not actually resist arrest, because he did eventually drop it. Can you not infer a resistance of arrest, and can you not infer from that consciousness of guilt? But more than that, ladies and gentlemen, isn't that testimony relevant for another purpose? Because you have to look at this situation as a whole, if you believe the testimony of Charles McNeil as substantially corroborated by that of Mrs. McCoates, didn't this man go beserk that night? Didn't he completely lose his head and is that not -- is not this activity with the 2 by 4, coming down the stairs with the 2 by 4, isn't that simply a continuation of that activity, the young man was in a frenzy?" (Tr., Closing Statements, 5-7).

Defense counsel immediately objected, and a bench conference ensued. The trial judge agreed that the remarks were improper, but declined to have them stricken from the record or to instruct the jury.

The quoted excerpt from the prosecutor's summation is highly improper and prejudicial, and requires the reversal of Appellant's conviction, for at least three reasons:

(1) The prosecutor's emphatic declarations that Appellant, prior to his arrest by Captain Wissman, held a two-by-four piece of wood in a treatening manner, that the jury was entitled to infer that Appellant was contemplating resistance to his arrest, and that this piece of wood showed consciousness of guilt by the defendant, were devoid of support in the record. Captain Wissman, Charles McNeil, Mary McCoates and Appellant all testified on Appellant's action as he came down the stairs when Captain Wissman arrived, and none of them provided any evidence to justify the conclusions reached by the prosecutor in his summation. Since a jury verdict favorable to Appellant depended on whether they believed that Appellant told the truth on the stand (and correspondingly, did not believe the government's alleged eyewitness, McNeil), and since in coming to a decision about Appellant's credibility the jury was obviously influenced by his activity and demeanor when Captain Wissman appeared on the scene shortly after the beating of Cooper occurred, the prosecutor's extensive remarks regarding the two-by-four piece of wood and the very questionable inferences which he felt could be drawn from the fact that Appellant was holding the piece of wood when Captain Wissman arrived, were highly prejudicial, were likely to have affected the jury's decision, and hence, necessitate a reversal of Appellant's

conviction by this Court. See Garris v. United States, 129 U.S. App. D.C. 96, 390 F.2d 862 (1968); King v. United States, 125 U.S. App. D.C. 318, 372 F.2d 383 (1967); Reichert v. United States, 123 U.S. App. D.C. 294, 359 F.2d 278 (1966).

Significantly, at the first trial, Judge Bryant refused to permit testimony regarding the two-by-four piece of wood. He concluded that, contrary to the government's contention, the proposed testimony concerning the two-by-four, when viewed in connection with the other testimony on Appellant's demeanor, (i) clearly indicated that the two-by-four was not held in a threatening manner, (ii) could not reasonably support an inference that Appellant was attempting to flee the scene of the crime, (iii) did not provide a basis for inferring Appellant's consciousness of guilt, (iv) was not otherwise relevant to Appellant's alleged commission of the crime charged, and (v) was not admissible.

(2) If as prosecutor declared in his summation, the Appellant's carrying of a two-by-four piece of wood indicates consciousness of guilt, this presumably is because it evidences an attempt to flee from the scene of the crime. Apart from the fact that the evidence in the record in no way shows any attempt at flight by Appellant, and in fact, indicates that Appellant acted in a very docile and accomodating manner when Captain Wissman arrived, a direct or indirect government allegation that Appellant attempted to flee the scene of the crime and that such an attempt evidenced consciousness of guilt required a court instruction to the jury regarding flight. In view of the highly prejudicial nature of evidence of flight in Appellant's

case, failure to give such instruction, in itself, is grounds for reversal.*

(3) Prosecutor's exaggerated claims that Appellant went "beserk", "lost his head", and was in a "frenzy" on the night of the alleged crime were at odds with the Grand Jury indictment, the government's position at trial, and the record. The defense did not at either trial rely on insanity or other mental condition of the defendant. The only purpose to be served by such inflammatory remarks was to place the jury in fear of the Appellant and his release in the event of acquittal. As the law discussed below indicates, such highly prejudicial comments on a critical aspect of the government's case (i.e., Appellant's demeanor on the night of the alleged crime) requires a reversal of Appellant's conviction, especially where the trial judge does not admonish or instruct the jury to disregard the comments.

In Turner v. United States, 415 F.2d 1234 (5th Cir. 1969), it was held to be reversible error for the prosecutor to "inflame" the jury by making inferences unrelated to the charge. The defendant in Turner had been charged with the illegal sale of narcotics. During the trial it was adduced that the accused had worked in a hospital where he had access to narcotics. During his closing argument, the prosecutor made

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* The appropriate instruction would be: "Flight or concealment by the defendant, after a crime has been committed, does not create a presumption of guilt. You may consider evidence of flight or concealment, however, as tending to prove the defendant's consciousness of guilt. You are not required to do so. You should consider and weigh evidence of flight or concealment by the defendant in connection with all the other evidence in the case and give it such weight as in your judgment it is fairly entitled to receive." Instruction No. 27. Jr. Bar Section of D.C. Bar Ass'n, Criminal Jury Instructions for the District of Columbia (1966).

reference to this testimony, but it was held to be improper because it was unrelated to the charge and thus "had no tangible connection" to the government's case, and could only serve to inflame the jury.

Traxler v. United States, 293 F.2d 327 (5th Cir. 1961), is similar to the present case in that the prosecutor used his closing argument to paint a fearful picture of the defendant before the eyes of the jury. The accused in Traxler was charged with the possession of untaxed whiskey. During summation, the prosecutor spoke of "getting out here on the highway, drinking whiskey, and killing people." The Court of Appeals found this to be prejudicial and reversed. See also Washington v. United States, 327 F.2d 793 (5th Cir. 1964).

As in Turner, supra, the summation of the prosecuting attorney in the case at hand raised issues which were unrelated to the charge against the accused, or to the defense raised by him. Additionally as in Traxler, supra, the closing argument was highly inflammatory and prejudicial because it raised before the jury the spectre of a man gone uncontrollably beserk, lashing out in a frenzy. With this vision of the defendant in the minds of the jurors, dispassionate and fair consideration could not be given to the alibi defense which had been raised. This prejudice was compounded by the fact that the trial judge failed to instruct the jury to ignore the prosecutors remarks. See United States v. Schwartz, 325 F.2d 355 (3d Cir. 1963), where it was held that when a prosecutor makes reference to "prejudicial facts having no basis in the record," the jury should be admonished to disregard them, and Traxler v. United States, supra.

A final point needs to be made regarding the conduct of prosecuting attorneys in the District of Columbia generally. As this

Court disparingly noted in Harris v. United States, 131 U.S. App. D.C. 105, 402 F.2d 656 (1968), "the frequency with which violations of standards of permissible argument occur is disturbing." The present appeal is just the latest in a series of cases where prosecutors in the District have embarked upon improper and unprofessional summation. See Gibson v. United States, 131 U.S. App. D.C. 163, 403 F.2d 569 (1968); Johnson v. United States, 121 U.S. App. D.C. 19, 347 F.2d 803 (1965), and cases cited supra, page 23. It is especially disturbing that counsel for the government raised the issues which he did when he could see from the record of the case that the Appellant had been found mentally competent prior to the first trial, when he knew that in neither trial had the defense relied upon insanity or other mental condition of the defendant, and when it was obvious that the record did not provide a reasonable basis for an inference that Appellant acted in a threatening manner toward Captain Wissman, was contemplating resistance to arrest, or was conscious of his guilt. Appellant believes that this is an appropriate case for this Court to take affirmative action to insure that the right to a fair trial of this defendant, and future defendants, is not denied by the continued use of improper summation on the part of the government prosecutors.

CONCLUSION

For the reasons stated in each of the points above, Appellant's conviction on a count of second-degree murder must be reversed.

Respectfully submitted,

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